Nos. 96-843 & 96-847

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,
v.
FIRST NATIONAL BANK AND TRUST COMPANY, *et al.*,
Respondents.

CREDIT UNION NATIONAL ASSOCIATION, *et al.*,
Petitioners,
v.
FIRST NATIONAL BANK AND TRUST COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CONSUMER FEDERATION OF AMERICA, INC., AND U.S. PUBLIC INTEREST RESEARCH GROUP, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF CONSUMER FEDERATION OF AMERICA, INC., AND U.S. PUBLIC INTEREST RESEARCH GROUP, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted in support of the petitioners, the National Credit Union Administration ("NCUA") and Credit Union National Association, et al. ("CUNA").* By letters filed with the Clerk of the

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* Only undersigned counsel authored this brief. CUNA is a member of *amicus curiae* Consumer Federation of America, Inc.

Court, Petitioners NCUA and CUNA, and Respondent First National Bank and Trust Co., et al., have consented to the filing of this brief.

INTERESTS OF *AMICI CURIAE*

The Consumer Federation of America, Inc. ("CFA") is a nonprofit organization incorporated under the laws of New York and exempt from federal income taxation under § 501(c)(4) of the Internal Revenue Code. Organized in 1967, CFA is a federation of 240 local, state and national consumer groups throughout the United States representing more than 50 million members. CFA gathers facts, analyzes issues and disseminates information to the public, Congress and federal agencies to provide a voice for the concerns of consumers, particularly those of limited means who are least able to speak for themselves. CFA represents the American consumer on a variety of issues that affect their daily lives, including financial issues. CFA has resolved to support a strong, independent, consumer-owned and -controlled credit-union system.

The U.S. Public Interest Research Group, Inc. ("U.S. PIRG") is a nonprofit organization incorporated under the laws of the District of Columbia and exempt from federal income taxation under § 501(c)(4) of the Internal Revenue Code. Organized in 1983, U.S. PIRG is the national lobbying office of all State PIRGs. Its purposes include the identification of problems and advocacy of solutions on a variety of issues by conducting research, analysis, testing and investigation, publishing information and providing public education on such issues, including consumer protection. The leading issue in U.S. PIRG's current legislative agenda on consumer protection involves financial services, and it has for years advocated the advantages of joining credit unions.

SUMMARY OF ARGUMENT

Congress first authorized the federal chartering of credit unions in 1932, in its capacity as legislature for the District of Columbia. When granting to the D.C. Commissioners the power to approve the first federal credit unions, Congress did so understanding that the D.C. Commissioners desired to have "absolute discretion as to the . . . size" of each credit union, considering the unit's proposed "field of membership" (including the common-bond requirement). Acting for the nation in 1934, Congress essentially adopted the 1932 statute, but in setting forth considerations for the new (federal) regulatory agency, substituted "economic advisability" for the narrower "field of membership" when addressing the scope of that agency's approval authority. A generation later, Congress maintained its interest in encouraging the growth of federal credit unions by creating in 1970 an independent agency for their regulation. Congress evidenced its determination to advance these units by empowering an increasingly capable regulatory authority to approve applications based on their economic prospects for success, which the National Credit Union Administration ("NCUA") has done in approving multiple-employer groups.

The underlying purpose of these enactments was to provide the unique advantages of credit unions to the nation's working men and women through federal chartering. Credit unions, as cooperative nonprofit organizations of consumers overseen by volunteers from their own ranks, offer the opportunity for self-help that puts service before profit and helps affirm the democratic value of voluntary associations for mutual support, observed with lasting influence by Alexis de Tocqueville but slipping from modern society's grasp. The more traditional, economic advantages of such institutions in the form of favorable rates, yields and fees provided to their members is especially vital to underserved communities where credit unions are the only source of reasonable financial assist-

ance, and has the further consequence of restraining the cost and enhancing the gain of comparable products provided elsewhere in the financial marketplace. The provision of these social values and economic benefits fulfills the historic purpose that began in the Depression-era Congress, and NCUA's approval of multiple-employer groups is an important means by which the agency has been faithful to its legislative charge.

ARGUMENT

I. THE 1934 ACT EXPANDED THE BROAD DISCRETION, GRANTED BY THE 1932 ACT TO THE AGENCY THAT REGULATES FEDERAL CREDIT UNIONS, TO APPROVE APPLICANTS BASED ON THE LIKELIHOOD OF THEIR ECONOMIC SUCCESS, A DISCRETION REINFORCED IN THE 1970 ACT WHICH MADE THAT AGENCY INDEPENDENT.

The Federal Credit Union Act of 1934, Pub. L. No. 73-467, 48 Stat. 1216 (June 26, 1934) ("FCUA"), was based largely on the statute passed by the previous Congress, the District of Columbia Credit Unions Act of 1932, Pub. L. No. 72-190, 48 Stat. 326 (June 23, 1932) ("DC Act"). In the DC Act, Congress chose to grant to the agency assigned to regulate credit unions (the Commissioners of the District of Columbia) a broad discretion to approve any credit union certificate presented to it that, *inter alia*, demonstrated the "advisability of establishing a credit union in the proposed field of membership." *Id.*, § 4(3), 48 Stat. 327.

In the FCUA, Congress expanded that discretion by removing the reference to "proposed field of membership," which incorporates the "common bond" requirement now before the Court, and replacing it with the broader criterion of the "economic advisability of establishing the proposed Federal credit union." *Id.*, § 4(3), 48 Stat. 1217, 12 U.S.C. § 1754(3). These enactments reflect the

increasing Congressional emphasis on regulatory consideration of economic conditions that support the current interpretation of "common bond" by the National Credit Union Administration ("NCUA"), a proposition advanced by the enhancement of regulatory authority when Congress created NCUA in 1970.

The 1934 Senate Report on the bill (S. 1639) that became the FCUA stated: "[T]he 1932 Congress enacted such a law for the District of Columbia (*which supplies the basis for part I of this Senate bill 1639*, and establishes a precedent for Federal credit unions)." S. Rep. No. 555, 73d Cong., 2d Sess., at 2 (1934) (emphasis added). In the process of passing the DC Act in 1932, the contributions of the D.C. Corporation Counsel's office had pursuasive weight on the Congress, *see, e.g.*, H.R. Rep. 2908, 71st Cong., 3d Sess., at 1 (1931) (Corporation Counsel submission on credit-union history was "brilliantly discussed").

During hearings on the DC Act, the Office of the Comptroller of the Currency ("OCC") unsuccessfully opposed the legislation, maintaining that the District of Columbia had become "very much 'overbanked.'" *A Bill to Provide for the Incorporation of Credit Unions in the District of Columbia: Hearings on S. 1153 Before the Senate Comm. on the District of Columbia*, 72d Cong., 1st Sess. at 6 (1932) ("1932 Senate Hearings on DC") (letter from Comptroller of the Currency Polk, Jan. 15, 1932). The Comptroller also objected to the power granted the D.C. Commissioners to approve credit-union organization certificates, seeking "complete discretion" over such matters in the OCC. *Id.*, at 7.

However, the Assistant Corporation Counsel of the District of Columbia opposed granting "blanket discretion" without specifying particular matters to be considered. *Id.*, at 16 (statement of Mr. Roberts). Two weeks later, Corporation Counsel offered an amendment in which the

Commissioners retained ultimate authority to approve the certificates, but were authorized to refer applications to OCC for a report on, *inter alia*, "the advisability of establishing a credit union in the proposed field of membership." *Id.*, at 23, 40. This amendment was enacted as Section 4 of the DC Act. Commenting on the amendment, Mr. Roberts stated:

> In the amendment that was prepared by the commissioners, the Senator will note that *the commissioners have absolute discretion as to the unit, the size of the unit*, which they will allow to be the source of the membership of the given credit union at the time of its incorporation, and they may refer the matter to the Comptroller of the Currency for reports as to . . . (3) the advisability of establishing a credit union in the proposed field of membership. *1932 Senate Hearings on DC*, at 40.

Testimony immediately following addressed the exercise of discretion whether a hypothetical credit union might be too large a unit in the *District of Columbia, id.*, but discretion can operate both ways as the regulatory agency seeks to foster the growth of private institutions designed, as the next Congress made clear, to "make *more available* to people of small means credit for provident purposes through a *national system* of cooperative credit . . . ." 48 Stat. 1216 (1934), 12 U.S.C. § 1751 (emphasis added). In consequence, the agency was given a wide discretion to create that system.

In that next Congress, Senator Sheppard introduced a bill (S. 1639) which would, in § 4, have substituted for the D.C. Commissioners the "Federal Reserve bank in the district indicated in the organization certificate," while retaining the identical criterion for approval of such certificates regarding the "advisability" of their "proposed field of membership." S. 1639, 73d Cong., 1st Sess. at § 4 (May 11, 1933). The House Committee on Banking

and Currency favorably reported S. 1639 with an amendment that changed § 4 of the Senate version by substituting the "economic advisability of establishing the proposed Federal Credit Union" for the narrower criterion contained in the DC Act, the "proposed field of membership." H.R. Rep. No. 2021, 73d Cong., 2d Sess. at 2 (1934).

The change in § 4 also substituted the Farm Credit Administration for one of the Federal Reserve banks as the agency to regulate federal credit unions, *id.*, as was explained by Congressman Steagall, the floor manager of the bill in the House and Chairman of the House Committee on Banking and Currency. He stated that to "those interested in framing the bill," the Farm Credit Administration was the "most experienced branch [of the executive] in the matter of cooperative credit." 78 Cong. Rec. 12224 (1934) ("1934 House Debate"). There appears to be no similar explanation for the other change in § 4 regarding the substitution of the new criterion, "economic advisability." Section 4 was enacted as so amended.

The change in statutory language, from both the DC Act and the Senate bill, substitutes general "economic" considerations for specific "field[s] of membership" that include common-bond proposals. Such a change on its face would appear to modify the terms of the agency's discretion so that in the end, the regulatory agency was required to construe the field of membership such that no certificate would be issued unless it were found to be economically viable.

The NCUA—ultimate successor to the Farm Credit Administration—is thereby freer under the FCUA to consider contemporary economic uncertainties such as corporate and government downsizing, plant closings, insolvencies, mergers and acquisitions in determining the prospective viability of a proposed federal credit union, and freer to approve multiple-employer groups as a method to

minimize such risks to the proposed unit, than the Commissioners would have been under the DC Act. The discretionary power granted NCUA's predecessor under the 1934-amended § 4 of the FCUA is thus harmonized with the agency's current interpretation of "common bond" under the 1932-established content of that requirement in § 9, particularly in light of the compelling public policy manifested in the 1934 statute to encourage the proliferation of these uniquely American institutions for the benefit of the "masses" of people in the United States. *See* Part II, *infra*.

The creation of NCUA as an independent agency in 1970, Act to Amend the FCUA, Pub. L. No. 91-206, 84 Stat. 49 (Mar. 10, 1970) ("1970 Act"), generally reinforced the broad discretion granted in the 1930's to the agencies that became successively responsible for approving federal credit unions (as distinct from those chartered by the several States). An important link in this continuity is the role of Congressman Wright Patman, who as chairman of the House Banking and Currency Committee in 1969 introduced the bill (H.R. 2) that became the 1970 Act. *See* S. Rep. No. 518, 91st Cong., 1st Sess. (1969), *reprinted in* 1970 U.S.C.C.A.N. at 2479. Thirty-five years earlier, Congressman Patman had also been the sole House sponsor of the bill that became the FCUA in 1934, along with "every piece of Federal credit union legislation" in between. 115 Cong. Rec. 20884 (1969) ("1969 House Debate") (remarks of Cong. Patman).

After noting credit-union innovations for military servicemembers and students, Congressman Patman stated that H.R. 2 was designed so that such programs "can be more readily put into operation," notwithstanding the fact that there had already been a "tenfold increase in the number of credit unions since the time the [FCUA] was passed." 1969 House Debate, at 20884-5 (including State credit unions). His views reflected those of his committee, which, in favorably reporting H.R. 2 by unanimous vote, *id.* at 20885, expressed concern about the "growth of the Federal credit union movement" without an independent regulatory agency like NCUA. H.R. Rep. No. 331, 91st Cong., 1st Sess., at 3 (1969) ("1969 House Report"). Similar views about the purpose of the 1970 Act were expressed by others, *e.g.*, Congressman Barrett ("we can expect the continued advancement of the credit union program" under an independent agency, 1969 House Debate, at 20888); *cf.* Congressman Minish (independent agency will have more "credit union expertise," *id.* at 20890) (capabilities which the FCUA had tried to ensure by designating the Farm Credit Administration as the regulator of federal credit unions, *see* 1934 House Debate, at 12224).

In these three enactments, Congress moved in 1932 from granting to the D.C. Commissioners "absolute discretion as to the . . . size" of a federal credit union that had proposed a field of membership in the District of Columbia, to 1934 when it extended such discretion to the Farm Credit Administration in assessing the less restrictive "economic advisability" of federal applications nationwide, to creating the NCUA in 1970 so that the new agency could "more readily" establish such credit unions and thereby secure the "growth" and "advancement" of them. In this evolution, Congress expressed a consistent encouragement to expand the availability of, as Senator Yarborough called it in debating the passage of the 1970 Act, "the credit union movement, one of the most important forms of economic democracy, of mutual aid and self-help, in the Nation." 116 Cong. Rec. 2431 (1970).

II. UPHOLDING THE AGENCY'S DISCRETIONARY POWER TO APPROVE MULTIPLE-EMPLOYER GROUPS OF FEDERAL CREDIT UNIONS WILL SERVE THE PUBLIC PURPOSE OF THE CONGRESS TO EXPAND THE AVAILABILITY OF THE UNIQUE COMBINATION OF SOCIAL AND ECONOMIC ADVANTAGES PROVIDED BY THESE ORGANIZATIONS.

The FCUA reflects the two primary advantages of federal credit unions—economic and non-economic, or social—that underlie the statute's interest in their "growth," both contained in its preamble to "make more available . . . a national system of *cooperative* credit . . . ." 48 Stat. 1216 (1934), 12 U.S.C. § 1751 (emphasis added).

The less obvious advantage is found in the combination of features that make federal credit unions unique as organizations in the American financial services industry. Congressman Patman, called the "godfather of credit unions," 1969 House Debate, at 20887 (remarks of Cong. Annunzio), drew a powerful analogy suggesting the social value of credit unions that has endured since their inception, stating that "next to the church, the credit unions do more good for people than any other institution." 1969 House Debate, at 20884. The cooperative, nonprofit and volunteer features of credit unions that create their distinctive non-economic value are apparent in their collective treatment over time as a "movement." *See, e.g.*, 78 Cong. Rec. 12223 (1934) (remarks of Cong. Steagall, chairman of the House Committee on Banking and Currency); 1969 House Report, at 3 ("Federal credit union movement," referring to its growth as would be fostered by the creation of NCUA).

A major feature of credit unions in this regard was described by the House Committee on Banking and Currency, which declared federal credit unions to be a "socially desirable means of self-help." H.R. Rep. No. 2021, *supra*, at 2 (1934). The FCUA defined a federal credit union as a "cooperative," *id.*, § 2, 48 Stat. 1216, 12

U.S.C. § 1752(1), which continues to be understood today as an enterprise "operated by . . . consumers for their mutual benefit." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY at 321 (rev. ed. 1994). Consumers of financial services have need for the alternative of such collective activity. *See, e.g.*, Washington Post, Oct. 3, 1993, at 8 (Magazine) (founder of credit union comment that "[w]e're losing our sense of taking care of each other. . . . With everyone out for themselves, we've lost sight that cooperation is a higher ethic than competition."). *Cf.* American Banker, Apr. 22, 1997, at 1 (Comptroller of the Currency Ludwig notes, in discussing commercial-bank losses to competitors: "In these turf battles, people lose sight of the consumer.")

A second major characteristic is that federal credit unions are nonprofit organizations. *See* 26 U.S.C. § 501(c)(1). This nonprofit attribute alone is important to credit union customers. *See, e.g.*, N.Y. Times, Sep. 17, 1996, § 3, at 4, col. 1 (subject cites nonprofit status as reason for selection of credit-union membership over competition). Congress early understood that "a credit union must operate for service rather than profit," *A Bill to Provide for the Incorporation of Credit Unions in the District of Columbia, et al.: Hearings on S. 4775, et al., Before the Senate Comm. on the District of Columbia*, 71st Cong., 3d Sess., at 10 (1931) ("1931 Senate Hearings on DC") (statement of postal official Brehm) and that it is a "cooperative society with no outside invested capital." 1932 Senate Hearings on DC, at 51 (article by movement leader Bergengren). That credit unions still perform in accordance with this credo is reflected by the fact that they unvaryingly prevail over banks in the annual customer-satisfaction surveys conducted by the American Banker among bank customers and credit-union members. *See*, American Banker/Gallup Consumer Surveys (1984-95).

A third exceptional feature of these organizations is the extensive voluntarism that marks the credit-union com-

munity. The House Committee on Banking and Currency paid "tribute to the thousands of volunteer workers throughout the country who have formed credit unions and the millions of volunteers who operate these credit unions." 1969 House Report, at 3. See also the remark of Congressman Patman that these volunteers have "devoted . . . their lives to serving credit unions." 1969 House Debate, at 20885. It has been estimated that the value of volunteer time devoted to all credit unions annually is over one billion dollars. *See* 3 Federal Deposit Insurance Corp., BANKING REVIEW, at 25 (1990).

The importance of voluntarism has deep roots in our society. As Alexis de Tocqueville wrote, in democratic nations "none . . . is in a position to force his fellows to help him. They would all therefore find themselves helpless if they do not learn to help each other voluntarily." Tocqueville, 2 DEMOCRACY IN AMERICA Pt. II, c. 5, at 514 (P. Mayer ed., 1969). Voluntary associations of the sort Tocqueville found so important to the United States, and which are echoed in the makeup of federal credit unions, are in decline in contemporary times. *See generally* R. Putnam, "The Strange Disappearance of Civic America," 24 THE AMERICAN PROSPECT 34 (1996), in which the author asks his now famous question: "Why are more Americans bowling alone?" *Id.*, at 36. Recognition of this civic crisis has recently emerged in the Presidents' summit in Philadelphia, where Tocqueville's emphasis on the American habit of voluntarism was invoked by the leadership. N.Y. Times, Apr. 30, 1997, at A16, col. 1.

The loss of credit-union opportunities that would directly result from an affirmance in this case would include the advantages that credit unions offer to the society in the foregoing intangible respects, which can be difficult to quantify but which have demonstrably positive consequences. In an analysis of whether to choose membership in a credit union based on such intangibles, it was acknowledged that to do so "may not make sense to folks

with a bottom-line mentality, but it is part of credit unions' real appeal. Members enjoy a kind of emotional gain in belonging to a credit union." Your Money, June/July 1996, at 36 (Consumers Digest, Inc., pub.). The gain goes beyond credit-union members. *See generally* "The Influence of Democracy on the Sentiments of the Americans," Tocqueville, Part II, *supra*.

The more traditional category of advantages offered by federal credit unions is economic in nature, although even here, federal credit unions exhibit the exceptional attribute of seeking to address the needs of underserved populations. The most well-known economic advantage of credit unions is with respect to the more favorable rates, yields and fees they offer to their members, as compared to those offered by banks. As an example, a "comparison of average deals offered by credit unions and banks revealed that credit unions charge 11% to 24% less for car loans and credit cards and unsecured personal loans and pay one-half to one percentage point higher yields on deposits." Wall Street Journal, June 4, 1996, § C, at 23, col. 2 (reporting on study by "independent newsletter" Bank Rate Monitor). Similar advantages are maintained by credit unions with respect to fees for products such as checking and ATM use. *See, e.g.*, Journal Newspapers, Inc. (Fairfax, Va.), June 4, 1996, at T10 (reporting on Credit Union Fees Survey Report).

More broadly, the favorable position of credit unions in these matters has a beneficial restraining effect on comparable financial products offered by banks as they seek to meet the competition, thus benefiting bank customers indirectly as well as credit-union members directly. In commenting on the sometimes sharp competitive differences between credit unions and banks, the Cleary Professor of Finance at Boston College's Carroll School of Management (Edward Kane) noted that (particularly larger) credit unions "threaten not so much market share but pricing." USBanker, Nov. 1996, at 54. In providing

choice and competition, credit unions "bid down the margins" so banks can't charge higher prices in near-monoply markets. *Id.* at 58. *Cf.* American Banker, Apr. 1997, *supra*, at 1 (Comptroller Ludwig's affirmation that allowing various types of financial institutions to become more competitive is a winning proposition for all participants).

Those in need of the advantages offered by credit unions can be perceived in two ways. In general terms, the Senate Committee on Banking and Currency used the phrase "masses of the people," S. Rep. No. 555, *supra*, at 2; similarly, the House Committee on Banking and Currency used the term "wage workers." H.R. Rep. No. 2021, *supra*, at 2 (1934). One example of service to such rank-and-file employees occurred with respect to the shutdown of the federal government in 1996. "Among the best deals for strapped workers appear to be those offered by credit unions, many of which are granting low-interest or no-interest loans for furloughed members. Some are allowing members to withdraw certificates of deposit without penalty." Washington Post, Jan. 5, 1996, at D1, col. 1.

Moreover, in its preamble referring to those of "small means," the FCUA is given a more expansive reading. 48 Stat. 1216 (1934); 12 U.S.C. § 1751. The concept was raised during consideration of the DC Act of helping people who were "down to bedrock." 1931 Senate Hearings on DC, at 14 (statement of labor union representative Sartwell), and Professor Kane has noted that credit unions do a superior job of servicing underserved communities. USBanker, Nov. 1996, *supra*, at 58. The credit-union movement has acted responsibly to address the needs of this distinguishably disadvantaged segment of the country's population.

Poor and working-class neighborhoods have been particularly affected over the last decade as a result of consolidation in the banking industry, when bank branches have closed steadily, resulting in the growth of credit

unions as the most promising development. N.Y. Times, Sep. 11, 1995, at A1, col. 4. Moreover, large industrial employers, the traditional membership base for credit unions, are shrinking, not expanding, causing credit unions to reach out to underserved groups as one means to continue to grow. *See, e.g.*, St. Petersburg (FL) Times, Sep. 24, 1995, at 1H, 8H. In these inner-city areas, community-development credit unions have "mushroomed around the country," moving from approximately 100 five or six years ago to more than 300 today. USBanker, *supra*, at 59. And in other areas such as the Rio Grand Valley in Texas, it has been reported that credit unions are the "last and only resort for many of the poor who want to own their own homes." Wall Street Journal, Nov. 22, 1995, at T1. If all other sources of reasonable credit have abandoned the field, federal credit unions should be encouraged to expand into the resultant void, not inhibited by a cramped reading of the FCUA's fundamental purpose.

CONCLUSION

The advantages of federal credit unions to financial-services consumers, whether the benefits are intangible or economic, whether the consumers are members or potential members of credit unions or not, and whether the members are average workers or people of small means, are substantial. These are the benefits that underlay the Congressional determination to provide federal charters for credit unions to make their services more available in the FCUA, and to contemplate their growth in the creation of the NCUA. The advancement of the credit-union community fostered by NCUA's interpretation of the common-bond requirement is faithful to the legislation's emphasis on considering economic conditions to ensure federal credit unions' success, essential to some credit union members and important to all the nation's consumers.

For the foregoing reasons, we respectfully urge the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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